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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 301.

JAMES J. FLYNN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for Certiorari.

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St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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BRIEF

In Opposition to the Petition for Certiorari.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION BELOW.

In the Criminal Court of Shelby County, Tennessee, the petitioner, James J. Flynn, was convicted of involuntary manslaughter for which he was sentenced to serve six months in the Shelby County Workhouse and the judgment of conviction was affirmed by the Supreme Court of Tennessee (313 S. W. 2d 248).*

* For the text of the opinion, see page 3A, Appendix, Petition for the Writ of Certiorari.

The facts concerning the homicide are not controverted and are immaterial to the question presented for the Court's determination.

In the trial court, Flynn filed a plea in abatement to the indictment averring that the members of the grand jury were appointed from the jury list by the trial judge and not selected by lot as provided by Section 40-1501, Tennessee Code Annotated. The State's demurrer to the plea was sustained by the trial judge. Afterwards, the petitioner was put to trial resulting in the judgment of conviction.

On appeal to the Supreme Court of Tennessee, the petitioner argued that the failure of the trial court to select the grand jurors by lot instead of appointing them violated Article XI, Section 8, Constitution of Tennessee, and was a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States. Rejecting these contentions, the Supreme Court of Tennessee held that:

(1) It is proper for the trial judge to appoint grand jurors where there is statutory authorization (but declined to construe the statutes relating to the authority of the Criminal Court of Shelby County);

(2) Section 40-1501, Tennessee Code Annotated, is directory and not mandatory;

(3) The objection raised as to the organization of the grand jury is technical and devoid of substantial merit;

(4) There is no showing of fraud nor bias; and

(5) Since Section 40-1501, Tennessee Code Annotated, was not literally followed, the grand jury was at least a de facto grand jury and the indictment was valid.

JURISDICTION.

The jurisdiction of this Court is asserted upon the allegation that the Supreme Court of Tennessee has decided a federal question of substance not heretofore determined by this Court, and not in accord with the applicable decisions of this Court.

The petitioner relies upon Section 1257 (3), Title 28, United States Code Annotated, and insists that he has been deprived of his rights in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The opinion of the Supreme Court of Tennessee does not indicate that a substantial federal question nor any federal question was presented for its consideration. Although this Court under such circumstances will assume that a substantial federal question was not raised in the State courts (**Mutual Life Insurance Co. v. McGrew** [Cal. 1903], 187 U. S. 291, 309, 23 S. Ct. 375), the issue was presented by way of argument and brief in the State Supreme Court. Consequently, the conclusion is warranted that the State Court found the federal question to be insubstantial. The result reached by the State Court is correct, and this Court should dismiss the petition for lack of jurisdiction. **Culvert v. Chicago** (Ill. 1906), 201 U. S. 275, 26 S. Ct. 617; **Zucht v. King** (Tex. 1922), 260 U. S. 174, 43 S. Ct. 24.

This Court is without jurisdiction for the additional reason that the state decision rests upon an adequate and independent nonfederal ground. **Black v. Cutter Laboratories** (Cal. 1956), 351 U. S. 292, 76 S. Ct. 824, 100 L. Ed. 1188; **Herb v. Pitcairn** (Ill. 1945), 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789; **Enterprise Irrigating District v. Farmers Mutual Canal Co.** (Nebr. 1917), 243 U. S. 157, 37 S. Ct. 318, 61 L. Ed. 644.

Further, it is immaterial whether the decision of the State Court is right or wrong, since there is no allegation that the State Court adopted its view of the nonfederal question in order to evade a federal constitutional issue. **Enterprise Irrigating District v. Farmers Mutual Canal Co.**, supra. In that case, this Court stated that it is without power to disturb such a judgment.

Neither can the decision of the State Court be reviewed unless the nonfederal ground is unfounded. In **McCoy v. Shaw** (Okla. 1928), 277 U. S. 302; 48 S. Ct. 519, 72 L. Ed. 891, this Court declared:

> "It is settled law that a judgment of a state court which is put upon a nonfederal ground independent of the federal question involved, and broad enough to sustain the judgment, **cannot be reviewed by this court**, unless the nonfederal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of decision upon the federal question" (Emphasis supplied).

Although the foregoing appears sufficient to warrant the dismissal of the petition, another rule of law is invoked to sustain the position of the respondent. The rule has long been recognized that the state courts have absolute power and authority to adjudicate the common law of the state and to construe the state's statutes and constitution. However, the unequivocal language of Mr. Justice Cardozo is quoted as follows:

> "A judgment by the highest court of the state as to the meaning and effect of its own constitution is decisive and controlling everywhere."
>
> **Highland Farms Dairy, Inc., v. Agnew** (Va. 1937), 300 U. S. 608, 57 S. Ct. 549.

The application of the foregoing rule to the case at bar is obvious and a cursory reading of the opinion of the

Supreme Court of Tennessee discloses that the decision rests upon a rational basis in state law and adheres to principles long embedded in the jurisprudence of Tennessee.

QUESTION PRESENTED.

Where a state's highest court has consistently held that a state statute providing for the selection of grand jurors by lot is directory and not mandatory; where the state court found that there had been a substantial compliance with the state's statute; and where there is no allegation nor imputation of fraud nor bias, was the petitioner denied due process of law within the meaning of the Fourteenth Amendment when the petitioner was put to trial on an indictment returned by a de facto grand jury which was appointed by the trial judge instead of having been selected by lot as provided by the state statute?

STATUTE INVOLVED.

The statute involved is Section 40-1501, Tennessee Code Annotated, and is in the following words and figures, to-wit:

> "To form the grand jury the court shall direct the names of the jurors in attendance to be written on scrolls and placed in a box or other suitable receptacle and drawn out by a child under ten (10) years of age or the judge, and the twelve (12) whose names are first drawn shall be a grand jury for the term."

STATEMENT OF THE CASE.

The petitioner, while driving an automobile under the influence of an intoxicating liquor, collided with the automobile of Willie Payne, resulting in his death. The facts concerning the homicide are not disputed. The issue on appeal to the Supreme Court of Tennessee was the question

of law raised by the plea in abatement concerning the selection of the grand jurors under Section 40-1501, Tennessee Code Annotated.

In the Supreme Court of Tennessee, the petitioner argued that the method of empanelling the grand jury in the trial court violated Article XI, Section 8, of the Constitution of Tennessee, because the grand jurors were allegedly selected in a manner contrary to the general law of the State. Since the State's highest tribunal rejected this contention, any question involving the construction and meaning of the State Constitution is foreclosed in this Court. **Highland Farms Dairy, Inc., v. Agnew**, supra.

As here the petitioner also complained in the State Courts that he was denied due process of law under the Fourteenth Amendment of the Constitution of the United States. The sole insistence is that his constitutional rights were violated by being put to trial upon an indictment returned by a grand jury which was not empanelled strictly in accordance with Section 40-1501, Tennessee Code Annotated.

ARGUMENT.

For a number of reasons, the State insists that the Court should deny the writ of certiorari and the petition should be dismissed.

First. In support of his position, the petitioner relies upon **Reece v. State of Georgia** (1955), 350 U. S. 85, 76 S. Ct. 167, 100 L. Ed. 77. The case is authority for the proposition that where there is a systematic exclusion of members of the race of the accused from a grand jury, there is a denial of equal protection of the laws. Therefore, a real and vital disfinction is presented between Reece and the case at bar.

Second. The State Court followed the general rule which has been applied and approved in the federal courts holding that a petitioner cannot complain if he fails to allege or show prejudice or that the grand jurors were incompetent or disqualified. Irregularities in the selection of grand juries have been disregarded generally. **United States. v. Glasser** (7th C. C. A. 1940), 116 Fed. 2d 690, Modified on Other Grounds (1941), 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457, Rehearing Denied (1951), 315 U. S. 827, 86 L. Ed. 1222, 62 S. Ct. 629.

The same rule prevails in at least three other circuits. **Wolfson v. United States** (5th C. C. A. 1900), 101 Fed. 430; **Moffat v. United States** (8th C. C. A. 1916), 232 Fed. 522; Wuichet v. United States (6th C. C. A. 1925), 8 Fed. 2d 561, Certiorari Denied (1926), 270 U. S. 651, 46 S. Ct. 351, 70 L. Ed. 781. Technical objections to the formation of grand juries are generally disfavored. Thus, the rule has been stated that injury or prejudice must be alleged. **Hyde v. United States** (D. C. 1911), 225 U. S. 373, 32 S. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

Third. As pointed out by the Supreme Court of Tennessee, the state rule has long been established and consistently followed that Section 40-1501, Tennessee Code

Annotated, is directory and not mandatory. **Pybos v. State** (1842), 22 Tenn. 49; Workman v. State (1857), 36 Tenn. 425; **Epperson v. State** (1880), 73 Tenn. 291. The non-federal ground upon which these cases was decided was applied in the case at bar. Consequently, it cannot be successfully argued that this decision is arbitrary. The petitioner has neither suggested nor intimated that the State Court adopted its view of the matter to evade a federal constitutional issue. Instead, the reasoning used and result reached in this instance are both the pattern and the fabric of state law.

Fourth. The petitioner has attacked the State's application of the de facto doctrine. If this insistence is correctly understood, the petitioner assails the State Court's decision of state law. This clearly was within the province of the State Court. In disposing of this case, the State Court need not have gone further than adopt the rule announced in **Glasser** or reiterate the rule of its earlier cases. However, after adopting the rule of Glasser and holding that Section 40-1501, Tennessee Code Annotated, is merely directory, the State Court held that the grand jury was at least a de facto body. In recognizing the de facto rule, the State Court rejected the dictum of **Roberts v. State**, 147 Tenn. 328, 247 S. W. 101, where it was said there could be no such thing as a de facto grand jury. The effect of the Court's adoption of the de facto rule is to adhere to its former holdings to the effect that the Code Section is merely directory. Assuming that the Court had previously held that the Code Section is mandatory, and must be strictly construed, it follows that a valid indictment could be returned only by a de jure grand jury. Therefore, the Court elected to go further for the sake of consistency in state law and to clarify its own opinions. In doing so, the State Court announced a rule which has long been recognized in other jurisdictions. As pointed out in the opinion, the Roberts case is the only one in the United States declaring that there is no such thing as a de facto grand

jury. If the State Supreme Court had accepted the dictum of Roberts, the Court in substance would have reversed its earlier decisions in Pybos, Workman, and Epperson. These are questions of state law and can only be adjudicated by the state courts. They in nowise present substantial federal questions, and, hence, are not problems which this Court should be called upon to consider and decide.

Fifth. The other arguments advanced by the petitioner deal with various aspects of state law which have nothing whatever to do with a substantial federal question nor applicable decisions of this Court.

CONCLUSION.

In conclusion, the respondent respectfully insists that the petition should be dismissed for the reasons stated above and the reasons and authorities contained in the opinion of the Supreme Court of Tennessee.

Respectfully submitted,

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Certificate of Service.

The undersigned, a member of the Bar of the Supreme Court of the United States and the counsel of record for

the respondent, hereby certifies that on the .... day of September, 1958, he served the within and foregoing reply brief upon the petitioner, James J. Flynn, in the following manner as prescribed by Rule 33, Revised Rules of the Supreme Court of the United States: He deposited at the post office in Nashville, Davidson County, Tennessee, two copies each of the within and foregoing reply brief securely enclosed in an envelope, airmail postage duly prepaid, addressed to each of the following at his post office address as stated below, that is to say:

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